

I.

BACKGROUND

On April 19, 2013, in the district court for the Northern District of Ohio, Eastern Division, case number CR 13-148, petitioner pleaded guilty to six counts of bomb threats. (Pet. at 2). Petitioner's projected release date is November 30, 2016. (Mem. at 3).

Petitioner states that he requested placement in an RRC for the last twelve months of his sentence, *i.e.*, from November 30, 2015, to November 30, 2016, and instead received only six months, commencing on May 30, 2016. (*See* Mot. at 1; Mem. at 2). Petitioner claims that he did not receive individualized consideration for placement in an RRC as required by 18 U.S.C. § 3624. (Mem. at 4-6). He claims that had he received individualized consideration,² he would have been found eligible to be placed in an RRC as of November 30, 2015. (Mot. at 3).

Petitioner admits that he has not exhausted his administrative remedies, but contends that requiring him to do so would be futile. (Mem. at 2-3.1). He argues that the Bureau of Prisons ("BOP"), "either by policy or memo," has directed respondent "to approve inmates for no more than six (6) months halfway house time." (Mem. at 2). He also argues that there is insufficient time between now and November 30, 2015, to exhaust his administrative remedies "without moot[ing] this case."³ (Mem. at 3).

II.

STATUTORY FRAMEWORK

The BOP has the authority to designate the location of an inmate's imprisonment. Specifically, under 18 U.S.C. § 3621(b), the BOP has discretion to place an inmate in an available

² Petitioner contends that he was given the same six months in an RRC as all other prisoners despite the fact that he had completed a non-residential drug abuse program, is homeless, is not subject to supervised release, and has no prison disciplinary history. (Pet. at 3; Mem. at 4-6).

³ Petitioner alleges that he filed the Petition "within thirty (30) days of the RRC review." (*See* Mem. at 3.1).

penal or correctional facility and to direct the transfer of an inmate “at any time.” Rodriguez v. Smith, 541 F.3d 1180, 1182, 1185 (9th Cir. 2008).

“Two statutory provisions govern the BOP’s authority to place inmates in its custody in RRCs: 18 U.S.C. §§ 3621(b) and 3624(c).” Sacora v. Thomas, 628 F.3d 1059, 1061-62 (9th Cir. 2010). Section 3621 “governs the BOP’s authority in cases where a prisoner who has more than a year left to serve of his or her prison sentence requests a transfer to such a facility.” Id. at 1062 (footnote omitted). When determining which facility is suitable, the BOP must consider the following five factors:

- (1) the resources of the facility contemplated;
- (2) the nature and circumstances of the offense;
- (3) the history and characteristics of the prisoner;
- (4) any statement by the court that imposed the sentence --
 - (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
 - (B) recommending a type of penal or correctional facility as appropriate; and
- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

18 U.S.C. § 3621(b). In other words, § 3621(b) mandates that the BOP make an individualized assessment under the five statutory criteria when making transfer or placement determinations “to *any* available penal or correctional facility[],” including RRC placement. Rodriguez, 541 F.3d at 1188 (emphasis added).

When a federal prisoner approaches the end of his sentence, 18 U.S.C. § 3624(c) requires the BOP to decide whether the prisoner is suitable for transfer to an RRC to ease his transition back into a community. 18 U.S.C. § 3624(c)(6)(A); see Sacora, 628 F.3d at 1062. Specifically, § 3624(c) states:

The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.

1 18 U.S.C. § 3624(c)(1). In administering § 3624(c), the BOP considers the five factors set forth
 2 above in § 3621(b). Sacora, 628 F.3d at 1068.

3 4 III.

5 **EXHAUSTION AND SUBJECT MATTER JURISDICTION**

6 “[S]ection [2241] does not specifically require petitioners to exhaust direct appeals before
 7 filing petitions for habeas corpus.” Castro-Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir. 2001),
 8 overruled on other grounds by Fernandez–Vargas v. Gonzales, 548 U.S. 30, 126 S. Ct. 2422, 165
 9 L. Ed. 2d 323 (2006). Nevertheless, the Ninth Circuit requires, “as a prudential matter, that
 10 habeas petitioners exhaust available judicial and administrative remedies before seeking relief
 11 under § 2241.” Id.

12 The BOP has established an administrative remedy process permitting an inmate to seek
 13 review of an issue relating to “any aspect of his/her own confinement.” 28 C.F.R. § 542.10(a).
 14 Under that process, an inmate must proceed through four levels: (1) an attempt at informal
 15 resolution; (2) a formal written request to the warden for an administrative remedy; (3) an appeal
 16 to the regional director of the region where the inmate is confined; and (4) an appeal to the general
 17 counsel. 28 C.F.R. §§ 542.13 to 542.15. The appeal to the general counsel completes the
 18 administrative remedy process. 28 C.F.R. § 542.15(a). Here, petitioner concedes that he has
 19 failed to properly exhaust his administrative remedies. (Mem. at 1-3.1).

20 Petitioner’s failure to properly exhaust his claim does not, however, end the Court’s
 21 analysis. Rather, courts have discretion to waive prudential exhaustion requirements where
 22 “administrative remedies are inadequate or not efficacious, pursuit of administrative remedies
 23 would be a futile gesture, irreparable injury will result, or the administrative proceedings would be
 24 void.” Laing v. Ashcroft, 370 F.3d 994, 1000 (9th Cir. 1994) (citation and internal quotation marks
 25 omitted). In deciding whether to exercise this discretion, a “key consideration” is whether
 26 “relaxation of the [exhaustion] requirement would encourage the deliberate bypass of the
 27 administrative scheme.” Id. (citation and internal quotation marks omitted).

1 Where administrative exhaustion may allow an agency an opportunity to remedy its
2 mistakes before being haled into court, exhaustion is appropriate. See McCarthy v. Madigan, 503
3 U.S. 140, 145, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992). However, where the agency has
4 predetermined an issue before it, exhaustion would be futile and should be excused. Id. at 148.
5 The Ninth Circuit's opinion in Fraley v. U.S. Bureau of Prisons, 1 F.3d 924, 925 (9th Cir. 1993) (per
6 curiam), is instructive on this point. In Fraley, the Ninth Circuit waived a petitioner's failure to
7 exhaust where the petitioner's initial attempt to avail herself of the prison's administrative process
8 was denied pursuant to the mechanical application of an official BOP policy. Fraley, 1 F.3d at 925.
9 The Ninth Circuit explained that an additional attempt to exhaust administrative remedies would
10 be futile because the reviewing official "would almost certainly have denied [the petitioner's]
11 request as well, citing the same official [BOP] policy." Id.

12 Here, by contrast, there is no reason to believe that an attempt on petitioner's part to
13 exhaust his administrative remedies would be futile. Unlike the claim in Fraley, which was denied
14 pursuant to a rigid BOP policy, petitioner's challenge to his RRC placement determination involves
15 a review of an individualized assessment of the designated five statutory criteria. See Rodriguez,
16 541 F.3d at 1188. As such, there is no reason to believe with any degree of certainty that, for
17 example, either the regional director or the general counsel would reach the same conclusion as
18 did the warden with respect to petitioner's request for twelve months of RRC placement.

19 Nor is there any merit to petitioner's assertion that the BOP has categorically predetermined
20 that no more than six months of RRC placement is necessary to prepare prisoners for their
21 reentry. (See Mem. at 2-3.1). Where, as here, the BOP has statutory authority under 18 U.S.C.
22 § 3624(c) to place prisoners in RRC facilities for a specified period of time, the BOP cannot
23 categorically predetermine that all prisoners are suitable for RRC placement for a period shorter
24 than that authorized by § 3624(c). See Rodriguez, 541 F.3d at 1184-85. Thus, in Rodriguez, the
25 Ninth Circuit struck down a BOP regulation that automatically restricted a prisoner's placement
26 in an RRC to the lesser of 10% or the last six months of his sentence, when the version of §
27 3624(c) then in effect authorized RRC placement for as much as the last six months of a prisoner's
28 sentence. Id. By categorically restricting RRC placement to the lesser of 10% or the last six

1 months of a prisoner's sentence, the BOP's regulation, among other things, violated "the
 2 unambiguously expressed intent of Congress conveyed in section 3621(b), which expressly
 3 instructs that all placement and transfer determinations take into consideration each of the five
 4 factors enumerated in the statute." Id. at 1186.

5 By contrast, the BOP can apply a presumption that all prisoners are suitable for RRC
 6 placement for a period shorter than that authorized by § 3624(c), provided that the BOP tests that
 7 presumption by conducting an individualized determination regarding the suitability of RRC
 8 placement for each eligible prisoner. Sacora, 628 F.3d at 1065-68. In Sacora, a petitioner
 9 challenged a BOP policy under which prison staff could presume that any inmate's pre-release
 10 RRC needs could be accommodated by a period of six months or less, even though section
 11 3624(c), as amended, provided that inmates were eligible for up to twelve months of pre-release
 12 RRC placement. Id. at 1061. The BOP, however, cautioned its staff that they could not
 13 "automatically deny an inmate's request for a transfer to a RRC," even if the request included time
 14 beyond the last six months of the inmate's sentence. Id. at 1064. Instead, staff were ordered to
 15 give "individualized consideration" to each inmate request for RRC treatment. Id. Notwithstanding
 16 this cautionary language, the BOP advised that "a[n] RRC placement beyond six months should
 17 only occur when there are unusual or extraordinary circumstances justifying such placement, and
 18 the Regional Director concurs."⁴ Id.

19 The Ninth Circuit held that the BOP did not exceed its statutory authority in maintaining this
 20 policy. Id. at 1065-68. In so holding, the Ninth Circuit found that "the BOP's policy -- that six
 21 months in a[n] RRC constitutes a 'sufficient duration' in most cases, but that each inmate is eligible
 22 for a 12-month placement and must be considered for placement in a RRC on an individual basis
 23 -- is facially consistent" with § 3624(c). Id. at 1066. In reaching this finding, the Ninth Circuit
 24 observed that § 3624(c) provided that the period in RRC placement be of a sufficient duration to
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 27 ⁴ The policy was subsequently revised to omit the need to obtain the Regional Director's
 28 approval for RRC placement beyond six months. See Harris v. Ives, 2014 WL 3504275, at *4, n.2
 (C.D. Cal. July 14, 2014).

1 ensure the greatest likelihood of successful reintegration into the community, but that the period
2 was “*not to exceed 12 months.*” Id. (emphasis added).

3 Moreover, the Ninth Circuit explained that neither the BOP’s six-month presumption nor its
4 requirement that unusual circumstances exist to justify RRC placements exceeding six months
5 violated the relevant statutes. As to the six-month presumption, the Ninth Circuit stated that the
6 BOP was “entitled to use its experience in interpreting and administering a statute.” Id. at 1067.
7 The Ninth Circuit also observed that the “unusual circumstances” requirement was justified as an
8 “extra check” on the longest placements in RRCs, particularly because § 3621(b) identified “the
9 resources of the facility contemplated” as one of the factors to consider when making placement
10 decisions. Id. at 1067. Additionally, according to the Ninth Circuit, that requirement furthered the
11 express goal of Congress of assisting offenders to reenter the community ““by providing sufficient
12 transitional services *for as short a period as possible.*”” Id. (quoting 42 U.S.C. § 17501(a)(5))
13 (emphasis added).

14 Finally, the Ninth Circuit found that the BOP’s policy did not result in the automatic denial
15 of RRC placement for more than the last six months of a prisoner’s sentence. Id. at 1068.
16 Distinguishing the regulation in Rodriguez, which necessarily precluded a consideration of the §
17 3621(b) factors, the Ninth Circuit noted that the BOP’s policy explicitly requires an individualized
18 assessment of each request for RRC placement. Id. And, unlike the regulation in Rodriguez, the
19 BOP policy admonished staff that it had to consider the five factors set forth in § 3621(b) in
20 reviewing all RRC placement requests.

21 Sacora forecloses petitioner’s argument as to the futility of exhausting his administrative
22 remedies. Indeed, petitioner’s contention that the BOP categorically refuses to place anyone in
23 RRC placement for longer than the last six months of his sentence (Mem. at 2-3), raises the same
24 arguments as those rejected by the Ninth Circuit in Sacora. But, as explained in Sacora, the BOP
25 only *presumes* that six months RRC placement is sufficient, while testing that presumption under
26 the five factors set forth in § 3621(b). Petitioner has offered no facts to suggest that the BOP
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1 deviated from that practice in his case.⁵ Accordingly, he has not shown that exhausting his
 2 administrative remedies would be futile.

3 Although the Court does not intend to reach the merits of petitioner's challenge to his RRC
 4 placement in this Order, that challenge nevertheless appears to be meritless. For the reasons
 5 discussed above, to the extent petitioner asserts a direct challenge to the BOP's purported
 6 categorical predetermination regarding the number of months of RRC placement necessary to
 7 prepare prisoners for their reentry (see Mem. at 1-3.1), that challenge fails.

8 Alternatively, to the extent petitioner is challenging the warden's individualized
 9 determination as to the amount of time that petitioner should spend in RRC placement, the Court
 10 lacks jurisdiction over any such challenge. See Reeb v. Thomas, 636 F.3d 1224, 1227-28 (9th
 11 Cir. 2011) (district courts lack jurisdiction to review "any determination, decision, or order' made
 12 pursuant to 18 U.S.C. §§ 3621-3264"); see also Brown v. Ives, 543 Fed. App'x 636, 637 (9th Cir.
 13 2013) ("Insofar as Brown is challenging the BOP's individualized determination concerning his
 14 [RRC] placement, the district court properly concluded that it lacked jurisdiction over the petition.")
 15 (citing Reeb, 636 F.3d at 1228); Thompson v. Ives, 2015 WL 413765, at *2 (C.D. Cal. Jan. 30,
 16 2015) (holding that court lacked jurisdiction to consider petitioner's challenge to BOP's
 17 particularized decision regarding his RRC placement) (citing Reeb, 636 F.3d at 1228; Caldwell v.
 18 Sanders, 2013 WL 1124712, at *1-2 (C.D. Cal. Jan. 23, 2013)).

19 Accordingly, petitioner has not exhausted his administrative remedies, and he has failed
 20 to demonstrate that any attempt to exhaust his administrative remedies would be futile. Moreover,
 21 to the extent petitioner is challenging the BOP's determination as to the amount of time he should
 22 spend in RRC placement (see Mem. at 4-6), that determination -- or the alleged failure to make
 23 an individualized determination -- should be challenged through the BOP's administrative remedy
 24 process. Reeb, 626 F.3d at 1227.

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 27 ⁵ Petitioner has provided no documents associated with his request for RRC placement or
 28 the denial of that request, so the Court cannot determine if those documents reflect that an
 individualized assessment was conducted.

IV.

CONCLUSION

Based on the foregoing, **no later than May 19, 2015**, petitioner is **ordered to show cause** (1) why the instant Petition should not be dismissed as unexhausted; and (2) why the Petition should not be dismissed for lack of subject matter jurisdiction.

Specifically, **no later than May 19, 2015**, petitioner is given a final opportunity to file a response with the Court, making clear his arguments, if any, as to why the Petition should not be dismissed as unexhausted⁶ and/or for lack of subject matter jurisdiction. Petitioner must submit all documents relating to his request for RRC placement, and the denial of that request. All facts relied upon by petitioner must be proved by testimony contained in a declaration signed under penalty of perjury pursuant to 28 U.S.C. § 1746, or in properly authenticated documents.

Failure to respond by May 19, 2015, will result in the instant Petition being summarily dismissed with prejudice as unexhausted and/or for lack of subject matter jurisdiction.

DATED: April 22, 2015



PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

⁶ As the Court herein has considered and rejected petitioner's arguments regarding futility, petitioner should not again argue this issue unless there is new information to support this argument.